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**IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS**

SHOLOMO DAVID,

APPELLANT

v.

THE STATE OF TEXAS,

APPELLEE

From the Court of Appeals, Eighth District of Texas
Case Number 08-18-00059-CR

APPELLANT'S REPLY BRIEF TO STATE'S PETITION FOR DISCRETIONARY REVIEW ORAL ARGUMENT REQUESTED

ATTORENY FOR APPELLANT:

LEONARD MORALES
State Bar No. 24010247
221 North Kansas St., Suite 1103
El Paso, Texas 79901
Phone: (915) 546-8185
Facsimilie: (915) 532-0904
e-mail: Leonard@lmoraleslaw.com

IDENTITY OF PARTIES AND COUNSEL

Pursuant to Texas Rules of Appellate Procedure, Rule 38.2(a), Appellant offers the following correction and additional names of all parties, trial and appellate counsel:

1. Defendant/Appellant Sholomo David was represented at trial by Omar Carmona and Cesar Lozano, Attorney's at Law, of the Carmona Lozano Meza Law Firm, 221 N. Kansas St., Suite 1200, El Paso, Texas 79901.

2. Defendant / Appellant was represented on appeal to the Eighth Court of Appeals by Peter R. Escobar, Attorney at Law, 701 N. St. Vrain St., El Paso, Texas 79902.

3. Defendant / Appellant is presently represented in this appeal by Leonard Morales, Attorney and Counselor at Law.

3. The State of Texas/Appellee was represented at trial by Jaime Esparza, District Attorney, 34th Judicial District Attorney's Office, by and through Chanel Rizk and Elizabeth Howard, Assistant District Attorneys, 500 E. San Antonio, Suite 201, El Paso, Texas 79901.

4. The State of Texas / Appellee was represented on appeal by Jaime Esparza, District Attorney, 34th Judicial District Attorney's Office, by and through Ronald Banerji, Assistant District Attorney, 500 E. San Antonio, Suite 201, El Paso, Texas 79901.

5. The State of Texas / Appellee is represented in this petition for discretionary review by District Attorney Yvonne Rosales, 34th Judicial District Attorney, by and through Justin M. Stevens, Assistant District Attorney, 500 E. San Antonio, Room 201, El Paso, Texas 79901.

6. The Trial Judge was the Honorable Anna Perez, 41st Judicial District Court, El Paso County, Texas, 500 E. San Antonio, Room 1006, El Paso, Texas 79901.

7. The Appeal was heard by the Eighth Court of Appeals, Honorable Chief Justice Yvonne T. Rodriguez, Justice Gina M. Palafox, and Justice Jeff Alley, 500 E. San Antonio, Room 1203, El Paso, Texas 79901.

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STATEMENT REGARDING ORAL ARGUMENT

To the extent that the Court believes that oral argument is necessary to the proper presentation and disposition of the issues presented, Counsel for the Appellant requests Oral Argument.

STATEMENT OF FACTS

Appellant agrees with a large portion of Appellee's statement of facts. However, Appellant does object to the summary offered by Appellant of the facts as asserted beginning on page 3, line 3 of Appellee's brief.

Appellee asserts:

> "Lieutenant Nava testified that the agents were unable to test the marijuana "because there was fecal matter mixed into [the marijuana]." (RR3 67). Lieutenant Nava stated that although it was possible that the marijuana could have been tested, they did not attempt to retrieve the marijuana due to health concerns. (RR3 70)"

(Appellee's Brief p. 2 -3)

Appellant herein offers actual testimony on this point and is as follows:

> "Q. All right. And what was found in the inside of that toilet?
> A. It was a green leafy substance, smelled like marijuana, looked like marijuana to me, through my training and experience. There were also some smaller glass pipes that are used to smoke narcotics that were located in there, smaller than the ones that -- the one that was actually found on the bed."
> (RR 3, 61)

"Q. Okay. Now, I imagine you took out what you could say -- that you tested that for marijuana?

A. We did not.

Q. Why not?

A. Because there was also fecal matter mixed into that. So the pictures and photographs of glass pipes that are commonly used for the smoking of the narcotics, plus our training and experience, knowing the smell and look of marijuana, was enough for us to say that was marijuana and those were glass pipes that were being flushed down that toilet.

Q. Again -- and we're talking about the marijuana, okay? Again, it's an educated guess, as you want to say it?

A. That is not a guess, no, sir.

Q. Okay. Well, then what physical proof do you have for the ladies and gentlemen of this jury that that is in fact marijuana?

A. My training and experience telling me what the smell of marijuana is and the look of marijuana.

Q. Right. Based on your educated guess -- your and experience, a guess?"

(RR 3 at 67-68) [1]

[1] Reference to the record of trial are as follows: Clerk's Record is designated as "CR" with the page number(s) included; reference to the Supplemental Clerk's Record is designated as "SCR"; reference to the Reporter's Record is designated as "RR" with the volume number and page number(s) included. References to Exhibits will be made as either "SX" or "DX" and exhibit number.

“Q. Okay. But you're saying that even the -- even what was on the side, there was no way of testing any sort of marijuana that -- or any leafy substance that was found there in the toilet?

A. There would be a way; but once again, the risk versus reward for us in that instance for a user amount of marijuana, it wouldn't warrant reaching into a dirty toilet to retrieve.

Q. Well, using your words, risk versus reward, wouldn't it be worth test- -- bringing these tests about in a criminal trial where someone's life or liberty is at stake so the ladies and gentlemen of this jury --

A. We had myself and more than enough training and experienced officers that can swear to what we saw and observed and smelled inside that room and inside that toilet.

Q. So the bottom line is, you didn't -- you all didn't want to get your hands dirty in extracting this green -- this leafy substance?

A. We didn't want to risk any health concerns by into there.

Q. Okay. But you're not testifying that there would have been no way to do it, correct?

A. No. I'm not testifying to that, no, sir.”

(RR 3 69-70)

SUMMARY OF ARGUMENT

RESPONSE TO STATES ISSUE ONE:

Contrary to the State's opinion the Court of Appeals is not requiring the State to disprove an alternative hypothesis regarding the offender's identity. The Court of Appeals is not announcing a new standard, test or theory in its examination of the facts adduced at trial. The Court of Appeals applied the appropriate standard of review and the law underlying its analysis of the case. The Court of Appeals found the circumstantial evidence too tenuous, with too many gaps and too many instances that called for speculation rather than the drawing of a rational inference. *David v. State*, 621 S.W.3d 920, 926-927 (Tex.App.-El Paso [8th Dist.] 2021).

In all, the Court of Appeals found "[f]or the jury to conclude from the evidence David placed the marijuana in the toilet by his mere presence would therefore be an unreasonable inference, amounting to no more than mere speculation. *See Gross v. State*, 380 S.W.3d 181, 188 (Tex. Crim. App. 2012) ("Juries are permitted to draw reasonable inferences from the evidence, but they are not permitted to draw conclusions based on speculation."). *David*, 621 S.W.3d at 927.

RESPONSE TO STATES ISSUE TWO:

The State argues that the Court of Appeals failed to apply the appropriate legal-sufficiency standard by improperly substituting its judgment for that of the jury's and disregarding the jury's common-sense inference that marijuana that has been contaminated with feces has been altered or destroyed.

However, the Court of Appeals found that the State failed to present any competent evidence from any witness or expert demonstrating that the marijuana in the toilet bowl was altered or destroyed as an element of the tampering with physical evidence offense.

Appellant concedes that there are sets of facts and circumstances where the State is genuinely unable to recover altered or destroyed drugs. There are numerous examples that have been cited in the briefs in this case that our Courts have grappled with. The State in its brief to the Court of Appeals cited a few of these cases and continues to present unpublished opinions to advance its points. However, a deeper dive into the State's cases reveals that in most instances law enforcement were able to recover and test the samples.

The Court's decision in *Rabb v. State*, 434 S.W.3d 16 (Tex. Crim. App. 2016) is where this Court found the factfinder could not simply infer that the baggie was destroyed in Appellant's digestive tract after he swallowed it. *Rabb*,

434 S.W.3d at 617–18. Clearly, *Rabb* is controlling in this regard and that was not lost on the Court of Appeals.

Appellant instead urges the Court to endorse the Court of Appeals finding that "[w]ithout any evidence the marijuana was altered by immersion in the toilet water, David's conviction cannot stand." *David*, 621 S.W.3d 920.

RESPONSE TO STATES ISSUE THREE:

The State's assertion that this conviction should have been reformed by the Court of Appeals to the lesser-included offense is incorrect. The State argues the Court of Appeals erred by failing to reform the conviction to the lesser-included offense of attempted tampering with physical evidence, thereby violating this Court's instruction in *Thornton v. State*, 425 S.W.3d 289 (Tex. Crim. App. 2014).

The Court of Appeals did address this issue in a footnote wherein it explained its rationale. "Here, even if the evidence supported a finding David intended to alter or destroy the marijuana, but failed, the evidence is legally insufficient to support David was the individual who placed the marijuana in the toilet putting the identity of the offender at issue so an analysis pursuant to *Thornton*, and *Rabb* would be inapplicable. *Id*.; *Rabb v. State*, 483 S.W.3d 16 (Tex. Crim. App. 2016)." *David*, S.W.3d at 928.

APPELLANT'S RESPONSE TO STATE'S GROUND FOR REVIEW ONE

The State alleges that the Court of Appeals misapplied the legal sufficiency standard of review by substituting its judgment for the jury's regarding probative circumstantial evidence associated with the offense, which will unreasonably impede the State's ability to use circumstantial evidence to prove identity in tampering cases.

Posturing aside, the Court of Appeals did not make any sweeping assertions or create a new rule of law in finding the circumstantial evidence insufficient in this case. Although, the State would like this Court to believe that a sweeping change in law occurs by upholding the Court of Appeal's findings, nothing could be further from the truth. In this case, the Court of Appeals invoked the correct standard of review and applicable law as urged by the State.

> "When reviewing sufficiency of the evidence, we consider the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Griffin v. State*, 491 S.W.3d 771,774 (Tex.Crim.App. 2016); see *Brooks v. State*, 323 S.W.3d 893, 895 (Tex.Crim.App. 2010)(plurality op.)(citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). We resolve any evidentiary inconsistencies in favor of the judgment, keeping in mind that the jury is

> the exclusive judge of the facts, the credibility of the witnesses, and the weight to give their testimony. *Brooks*, 323 S.W.3d at 899; see TEX.CODE CRIM.PROC.ANN. art. 38.04 ("The jury, in all cases, is the exclusive judge of the facts proved, and of the weight to be given to the testimony . . . ."). We determine, based upon the cumulative force of all the evidence, whether the necessary inferences made by the jury are reasonable. *Griffin*, 491 S.W.3d at 774."
>
> *David*, 621 S.W.3d at 925.

Moreover, the Court of Appeals limited its findings and conclusions to the particular facts of the case.

> "Here we have three individuals who were present, all with access to the bathroom, each had opportunity and access to the toilet and were charged with the offense. Lieutenant Nava conceded under cross-examination that the sound of flushing was not heard, he did not know who of the three arrestees placed the marijuana in the toilet and any of the three could have attempted to flush the toilet. Officer Carrasco stated he did not know why Appellant was in the bathroom or how long the marijuana had been in the toilet before the officers found it.

> Again, juxtaposed against the facts at hand, no officer directly observed Appellant place the marijuana in the toilet. Given the premises were rented by two other individuals, who were also charged with tampering with evidence, no evidence was presented as to how long the marijuana had been in the toilet. Further, the fact David had entered the room minutes prior to the police making entry, supports our conclusion the evidence is insufficient that David was the individual who placed the marijuana in the toilet. For the jury to conclude from the evidence David placed the marijuana in the toilet by his mere presence would therefore be an unreasonable inference, amounting to no more than mere speculation. *See Gross v. State*, 380 S.W.3d 181, 188 (Tex. Crim. App. 2012) ("Juries are permitted to draw reasonable inferences from the evidence, but they are not permitted to draw conclusions based on speculation.")
>
> *David*, 621 S.W.3d at 927.

The State argues this case is like *Hooper v. State*, 214 S.W.3d 9 (Tex. Crim. App. 2007) and controls in this regard, pointing to this Court's smoking gun analogy. Surely, the Court was not announcing a new talisman within that analogy. Assuredly, the Court did not intend that the illustrative allegory of a smoking gun amongst toy guns to be analogous to all real world situations.

Again, in this case the Court of Appeals is not announcing some new or novel theory or test. It is not presenting some farfetched or unfounded version of the facts. In its opinion the Court of Appeals went through the litany of items that for the Court called into question whether Appellant was the individual responsible for the marijuana being in the hotel toilet.

APPELLANT'S RESPONSE TO STATE'S GROUNDFOR REVIEW TWO

The State argues the Court of Appeals misapplied the legal-sufficiency standard of review by rejecting probative circumstantial evidence establishing that David altered or destroyed the marijuana by placing it in a toilet containing feces.

First Appellee would have this Court believe that it proved David altered[2] the marijuana. The Court of Appeals again relied on the facts on the record finding,

> [T]he State failed to present any evidence from any witness or expert demonstrating the toilet water had indeed altered or destroyed the marijuana.... Common sense tells us that water does not necessarily alter everything it touches.... Whether the marijuana can be dried and used is an unanswered question. We cannot

[2] The State in its PDR does not raise the issue of concealment as an element of tampering. Additionally, the Court of Appeals found the State on appeal asserted only that Appellant altered or destroyed the marijuana but does not assert that it was concealed and as such Appellant will not address concealment in this brief. *See*, *David*, 621 SW3d at 926.

> simply assume that it is unusable simply because it is repugnant that one would even attempt to do so.
>
> *David*, 621 S.W.3d at 927-928.

This case follows along a similar vein as this Court's cases involving Richard Lee Rabb. The Court will recall that Richard Lee Rabb was stopped by police officers as part of a robbery investigation. While being searched, Rabb pulled a small plastic baggie out of his pocket, hid it in his hand, and, when noticed by investigators, put the baggie in his mouth and swallowed it before the investigating officers could see what it contained. Rabb later told a medic that the baggie contained pills. No one ever made an attempt to recover the baggie or the pills. *Rabb v. State*, 483 S.W.3d 16, 18 (Tex. Crim. App. 2016)

On appeal, Rabb argued that the evidence presented was insufficient to prove that he destroyed the baggie. The court of appeals for Amarillo agreed, reversed the judgment of the trial court, and entered an acquittal. See, *Rabb v. State*, 387 S.W.3d 67, 73 (Tex. App.—Amarillo 2012). The State appealed to this Court, arguing that it was reasonable for the factfinder to infer that the baggie was destroyed in Appellant's digestive tract. This Court concluded "because no evidence was presented that would allow the factfinder to reasonably make this inference, the court of appeals was correct and the evidence was insufficient to

uphold Appellant's conviction. *Rabb*, 434 S.W.3d at 617–18." *Rabb*, 483 S.W.3d 18.

> "A fact finder is permitted to draw reasonable inferences from the evidence presented. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex.Crim.App.2007), quoting *Jackson*, 443 U.S. at 318–19, 99 S.Ct. 2781 (reviewing court must defer to responsibility of trier of fact to, inter alia, draw reasonable inferences from basic facts to ultimate facts). Despite the absence of direct evidence the baggie or its contents were destroyed by appellant's actions, if one reasonably can infer they were destroyed by their passage into appellant's digestive tract, the evidence is sufficient. *Hooper*, 214 S.W.3d at 13 (assessment of sufficiency of evidence involves determination whether, based on all the evidence and reasonable inferences therefrom, rational fact finder could have found guilt). We see no basis here for such an inference. *See Hooper*, 214 S.W.3d at 16 (inference is conclusion reached by considering other facts and deducing a logical consequence from them). On this record, any conclusion regarding the future of the baggie and its contents after appellant swallowed them would simply be speculation. *Id*. (speculation is mere theorizing or guessing). *Cf. Young*, 2010 WL 5129727, at *1–2 fn. 1, 2010 Tex.App. LEXIS 9459, at *4 fn. 1 (nurse testified swallowed cocaine "would pass through the system").
>
> *Rabb*, 387 S.W.3d at 74

In this case we have a very similar situation. If this Court could not find that one can reasonably infer the destruction of a baggie of drugs by passage through a person's digestive tract then how can this Court find that marijuana must be destroyed or altered by its presence in a toilet, even if accompanied by fecal matter.

In this Case the present issue is whether the evidence was in fact tampered with. The State would have this Court find that it can meet its burden by officers testifying as to what they believe they saw and to their lay opinions about the condition of evidence. There may be a case where there is in fact nothing more to go on. However, this certainly cannot be the case here. The alleged tampered with evidence sits in a toilet bowl in full view of law enforcement. Their rationale for not collecting the evidence, well it would be messy and unpleasant. In fact, the rationale given by Lieutenant Nava was:

"Q: There was no way of testing it?

A: There was a way...the risk versus reward for us was little for a "user amount"

(RR 3 69-70)

Lieutenant Nava's statement says it all, it was not that the evidence could not be collected or tested. Nava simply did not want to take time to do so. Instead offering a variety of justifications and excuses why the "marijuana" was not

collected or tested. Did Lieutenant Nava have the expertise to say whether the marijuana in the toilet could be tested? Who really knows? In any case, it becomes another gap in the evidence. In the end, he asserted that they simply did not take the time to collect it.

The State argued to the Court of Appeals that this case is analogous to *Diaz v. State* , Nos. 13-13-00067-CR & 13-13-00068-CR, 2014 WL 1266350, at *2 (Tex.App.—Corpus Christi Jan. 23, 2014, no pet.)(mem. op., not designated for publication). However, the State's reliance on the holding was misplaced. The Court of Appeals was correct to differentiate *Diaz* in that "there were no other occupants of the house and the Appellant told officers he was using the bathroom as they made entry pursuant to a search warrant." *Id*. at *2-3. Additionally, the officers in Diaz actually collected and recovered samples of crack cocaine from the toilet or commode for testing.

> "And who actually took those pieces of crack cocaine out of the toilet?" Id. at 64
> "I believe it was Lieutenant Riley." Id.
> "And how did he retrieve them?" Id.
> "He dipped them out with some type of container." Id.
> "Was he able to dip out all of them?" Id.
> "No, he wasn't." Id.
> "How were the others obtained?" Id.

"I took the commode up and emptied the liquid into a container until we could separate the crack cocaine out of that." Id.
They had to take the bolts out of the commode and unhook the water to do it. Id."

(*Diaz v. State*, State's Brief, p 8-9)

Lieutenant Nava and the State would have this Court believe that the "marijuana", was altered or destroyed such that it could not be tested. Although, Nava could allegedly smell it in the toilet (RR 3 61), and he could identify and distinguish between burnt and unburnt marijuana in the toilet (RR 3, 74). He would not however go so far as to soil his rubber gloves and attempt to retrieve a sample for testing. The officers did not even attempt to retrieve the alleged "glass smoking pipes." The reason they later stumbled upon for this omission was that it was due to health concerns. If this was indeed the case, then these officers must not be present at many crime scenes. It is not unheard of that biological hazards and matter abound. There exists the grit and grime of the not so desired places in our communities. Perhaps the officers here are being a bit disingenuous when they blame their distaste of unpleasant biological materials on a simple aversion to gathering evidence.

In this case, the State failed to present any evidence other than the lay opinion of Lieutenant Nava as to the viability, availability, and test-worthiness of

the marijuana allegedly in the toilet. Which does not constitute any evidence whatsoever, except speculation and conjecture. Where on the contrary courts of appeals have found in many instances similar circumstances where drugs have been recovered. *See e.g., Guillory v. State*, Nos. 09-18-00148-CR, 09-18-00149-CR, 09-18- 00150-CR, 2020 WL 216034 (Tex. App.—Beaumont Jan. 15, 2020, no pet.)(Guillory had "white residue in his cuticles and hands later tested and confirmed as cocaine; in bathroom plastic baggie found in toilet, crack cocaine on floor near toilet and on top of bowl and on toilet's handle, field tested result as narcotic.)*; Gordwin v. State* , Nos. 01-14-00343-CR & 01-14-00344-CR, 2015 WL 1967623 (Tex.App.—Houston [1st Dist.] Apr. 30, 2015, pet ref'd) (mem.op., not designated for publication)(Officer Santuario then took "a closer look at th[e] toilet" and "removed it from the base [on] the floor." Inside the toilet, he found "a small baggie that had crack cocaine in it."); *Diaz v. State* , Nos. 13-13-00067-CR & 13-13-00068-CR, 2014 WL 1266350 (Tex.App.—Corpus Christi Jan. 23, 2014, no pet.)(mem. op., not designated for publication)(Officers retrieved pieces of crack cocaine out of the toilet, took up the commode and emptied the liquid into a container until the crack cocaine could be separated out.)

Appellee would have this Court believe that Appellant "changed or modified the marijuana itself because, mixed with fecal matter, the marijuana was no longer capable of being collected or tested." (State's PDR p14) However, that was not the

testimony of Lieutenant Nava. Nava never testified that the marijuana was no longer capable of being tested.

> "Q. Okay. But you're saying that even the -- even what was on the side, there was no way of testing any sort of marijuana that -- or any leafy substance that was found there in the toilet?
>
> A. There would be a way; but once again, the risk versus reward for us in that instance for a user amount of marijuana, it wouldn't warrant reaching into a dirty toilet to retrieve."
>
> (RR3 69-70)

The Court of Appeals did not "reject" Lieutenant Nava's testimony out of hand. It instead required actual evidence beyond Nava's lay experience. As the Court of Appeals opined,

> "the State failed to present any evidence from any witness or expert demonstrating the toilet water had indeed altered or destroyed the marijuana. We have not uncovered any case that has found marijuana mixed with water, albeit toilet water, has modified the marijuana or rendered it useless. Common sense tells us that water does not necessarily alter everything it touches. While case law demonstrates cocaine is altered by water, it does not automatically follow an unrefined organic material, in its original state, is altered or destroyed by toilet water. The mere assertion that it does cannot support a conviction for tampering with evidence without more. Whether the marijuana can be dried and used is an unanswered question. We cannot simply assume that it is unusable simply because it is repugnant that one would even attempt to do so...

> The necessary evidence to prove the alteration or destruction of the marijuana was not presented nor proved. The chemical impact of the toilet water upon the marijuana cannot be left to a lay person to infer or assume."
>
> *David*, 621 S.W.3d at 927-928.

Is it common knowledge that water alters or destroys marijuana? Is it common knowledge that feces destroys or alters marijuana? It is common knowledge that watered down urine destroys or alters marijuana? Does toilet water destroy or alter marijuana? There was simply no evidence offered by the state on these points. Surely, a member of the State's Drug Testing lab could have provided some insight here. But that did not happen and the jury was left to speculate.

The State complains that "the burden should not be put on the State to present expert testimony in every tampering case to establish that the chemical composition of the evidence has changed when it is obvious that the evidence has been "altered" or "destroyed" within the meaning of section 37.09(d)(1)." (State's PDR, p22) No, the State should be should be held to its burden where it is required by law. The State should be required to meet its burden especially where a man is looking at 25 years to life as a potential punishment.

This Court has previously determined that "our interpretation of destroyed to mean ruined and rendered useless echoes a factor suggested by the State in *Spector* and the court of appeals in this case: that a thing is destroyed when it has lost its

identity and is no longer recognizable." *Williams v. State*, 270 S.W.3d 140, 146 (Tex. Crim. App. 2008). In this case Lieutenant Nava was able to magically identify the marijuana, as opposed to the tobacco residue found elsewhere, and according to him even smell it in the toilet, far from destroyed. Nava described the marijuana as only a "usable amount." And the State offered nothing more to show that the marijuana had "lost its identity and is no longer recognizable." *Id*. at 146.

Plainly, Lieutenant Nava was not qualified to offer an expert opinion on the chemical status or viability of the purported marijuana, nor does it seem that the State ever proffered Lieutenant Nava as such. Nevertheless, it is not common knowledge that water, feces, urine or any combination of them alters or destroys marijuana. The State provided no evidence on this point. The trial court left the jury to decide this by way of some "common sense inference." These are all excuses, justifications, pretexts and practices that the State would urge this Court to sanction and endorse so as to lessen the burden on the State in the prosecution of tampering with evidence cases.

APPELLANT'S RESPONSE TO STATE'S GROUND FOR REVIEW THREE

The State's assertion that this conviction should have been reformed by the Court of Appeals to the lesser-included offense is incorrect. The State argues the

Court of Appeals erred by failing to reform the conviction to the lesser-included offense of attempted tampering with physical evidence, thereby violating this Court's instruction in *Thornton v. State,* 425 S.W.3d 573 (Tex.Crim.App. 2020).

The Court of Appeals did address this issue in a footnote wherein it explained its rationale. "Here, even if the evidence supported a finding David intended to alter or destroy the marijuana, but failed, the evidence is legally insufficient to support David was the individual who placed the marijuana in the toilet putting the identity of the offender at issue so an analysis pursuant to *Thornton*, and *Rabb* would be inapplicable. *Id*.; *Rabb v. State*, 483 S.W.3d 16 (Tex. Crim. App. 2016)." *David*, 621 S.W.3d at 928.

The disposition of this issue depends on the Court's findings as to the primary two issues raised by the State. If the Court should uphold the Court of Appeals then under these facts Appellant argues a reformation would not be called for since it would necessarily find State failed to meet its burden as to the necessary elements of the offense. The State either failed to establish identity which would not call for a reformation, that is a failure of an essential and basic element of the offense.

However, if the Court should reverse on the issue of identity, it does not necessarily follow that an attempted tampering has occurred. This Court would still have to find that competent, credible and evidentiarily sound evidence has been

presented. First on whether there was marijuana in the hotel toilet in question. Second, was that marijuana altered or destroyed by simply being in the toilet water?

"In summary, then, after a court of appeals has found the evidence insufficient to support an appellant's conviction for a greater-inclusive offense, in deciding whether to reform the judgment to reflect a conviction for a lesser-included offense, that court must answer two questions: 1) in the course of convicting the appellant of the greater offense, the jury must have necessarily found every element necessary to convict the appellant for the lesser-included offense; and 2) conducting an evidentiary sufficiency analysis as though the appellant had been convicted of the lesser-included offense at trial, is there sufficient evidence to support a conviction for that offense? If the answer to either of these questions is no, the court of appeals is not authorized to reform the judgment. But if the answers to both are yes, the court is authorized—indeed required to avoid the "unjust" result of an outright acquittal by reforming the judgment to reflect a conviction for the lesser-included offense. *Thornton*, 425 S.W.3d at 299-300. Therefore, the issue of reformation may not yet be ripe.

APPELLANT'S REQUESTS AS TO REMAINING ISSSUES

Appellant did not abandon or waive those issues - and Appellant does not here concede or abandon any of those issues here.[3] "Having sustained David's first issue, accordingly, we do not reach whether he knew an investigation or official proceeding was in progress or pending nor his second, third, or fourth issue." *David*, 621 S.W.3d at 628.

And if this Court should Reverse the Court of Appeals then this case should then be remanded to the Court of Appeals for further proceedings on Appellant's remaining issues presented in his brief to the Court of Appeals. One or more of those remaining issues not ruled upon by the Court of Appeals may affect whether a reformation is required.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant prays that for the reasons stated above, the judgment of the 8th District Court of Appeals of Texas, El Paso be Affirmed and that Appellant's finding of acquittal remain.

[3] As it is understood by Appellant's Counsel, only the issues raised by the State in its PDR are now before the Court for its consideration.

Law Office of Leonard Morales
221 North Kansas St., Suite 1103
El Paso, Texas 79901
Tel: (915)546-2696
Fax: (915)532-0904
Leonard@lmoraleslaw.com

/s/Leonard Morales
Leonard Morales
Attorney and Counselor at Law
Texas Bar No.: 24010247
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief for the Appellant was hand-delivered and via eFileTexas.gov to the District Attorney's Office, 500 E. San Antonio, Room 201, El Paso, Texas 79901 and hand delivered to the Appellant, Sholomo David, at the El Paso County Jail Annex, 12501 Montana Ave, El Paso, TX 79938 on October 4, 2021.

/s/Leonard Morales
Leonard Morales

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief was prepared utilizing Microsoft Word and is being presented to the Court in Portable Document Format (.pdf). This document contains 4900 words.

/s/Leonard Morales
Leonard Morales

PD-0307-21

IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS

SHOLOMO DAVID,

APPELLANT

v.

THE STATE OF TEXAS,

APPELLEE

APPENDIX

FELIPE DIAZ v. STATE OF TEXAS
STATE'S BRIEF
EXCERPT

NO. 13-13-00067-CR

IN THE COURT OF APPEALS
THIRTEENTH DISTRICT OF TEXAS
CORPUS CHRISTI, TEXAS

FELIPE DIAZ,
Appellant,

v.

THE STATE OF TEXAS,
Appellee

STATE'S BRIEF

STEVEN E. REIS
State Bar No. 16757960
DEBORAH DICTSON
State Bar No. 24051732
1700 7th Street, Room 325
Matagorda County Courthouse
Bay City, Texas 77414
Telephone: (979) 244-7657
Telecopier: (979) 245-9409

ROBINSON C. RAMSEY
State Bar No. 16523700
Trinity Plaza II, Suite 900
745 E. Mulberry
San Antonio, Texas 78212
Telephone: (210) 736-6600
Telecopier: (210) 735-6889

ATTORNEYS FOR THE STATE OF TEXAS

THE STATE DOES NOT REQUEST ORAL ARGUMENT

being the person in possession of the cocaine in his home. *3 RR 46–51, 75, 126–27.*

In like fashion, Diaz infers in his favor that because the officers were able to recover cocaine from the toilet they "were able to retrieve all the cocaine discovered." *Appellant's Br. at 10.* But that is like saying an attorney was able to review all the items produced in response to a request for production: it does not take into account the items that were not produced. Here, the evidence and inferences, viewed in favor of the verdict rather than in favor of Diaz, demonstrate that the officers were not able to recover all the cocaine from the toilet that Diaz had just flushed. *3 RR 48-49.*

"What did you find?" the prosecutor asked Chief David Miles, who searched the bathroom after Diaz admitted to having just been there. *3 RR 47-48.*

"Flakes of cocaine in the commode," the chief replied. *Id. at 48.*

"Was there a significant amount of cocaine?" *Id. at 48.*

"No, there wasn't." *Id.*

That was consistent with Diaz having flushed the majority of it away. *Id. at 48-49.*

"You know, just from common knowledge," Chief Miles explained, "that if the amounts that a commode is actually able to handle or flush, it led me to believe that there was a whole lot larger quantity there, that the commode couldn't actually get rid of all of it."[2] *Id. at 49.*

"And who actually took those pieces of crack cocaine out of the toilet?" *Id. at 64.*

"I believe it was Lieutenant Riley." *Id.*

"And how did he retrieve them?" *Id.*

"He dipped them out with some type of container." *Id.*

"Was he able to dip out all of them?" *Id.*

"No, he wasn't." *Id.*

"How were the others obtained?" *Id.*

"I took the commode up and emptied the liquid into a container until we could separate the crack cocaine out of that." *Id.*

They had to take the bolts out of the commode and unhook the water to do it. *Id.*

"And what you observed," the prosecutor asked, "was it consistent with something being kicked back after a flush?" *Id.*

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[2]All "you knows," "uhs," "likes," and the like omitted unless otherwise noted.

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Leonard Morales on behalf of Leonard Morales
Bar No. 24010247
Leonard@lmoraleslaw.com
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